No. 21-869

In the
Supreme Court of the United States

ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.,
Petitioner,

v.

LYNN GOLDSMITH, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE COMMITTEE FOR JUSTICE IN SUPPORT OF RESPONDENTS

CURT LEVEY
THE COMMITTEE FOR JUSTICE
3033 Wilson Blvd.
Suite 729
Arlington, VA 22201
(202) 270-7748

JOHN M. REEVES
Counsel of Record
REEVES LAW LLC
7733 Forsyth Blvd.
Suite 1100--#1192
St. Louis, MO 63105
(314) 775-6985
reeves@appealsfirm.com

Counsel for Amicus Curiae

August 15, 2022

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE*[1]

The Committee for Justice ("CFJ") is a non-profit legal and policy organization founded in 2002. It is dedicated to promoting the rule of law and preserving the Constitution's protection of individual liberty, including the fundamental civil right to the fruits of one's own labor. CFJ believes that the Constitution's protection of intellectual property and physical property has helped to make the United States the most prosperous society in the history of the world.

Consistent with this mission, CFJ files amicus curiae briefs in key cases, supports constitutionalist nominees to the federal judiciary, and educates the American public and policymakers about the benefits of individual liberty and the proper roles of our federal courts and administrative agencies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Copyright protections serve to vindicate the fundamental civil right that authors have to the fruits of their labors. This is how the Founders understood it at the time they enacted the Constitution with its Copyright Clause, and this is how this Court has understood it ever since. Yet the Andy Warhol

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[1] In accordance with Supreme Court Rule 37.3, all parties consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part. No person aside from *amicus curiae* has made a monetary contribution to fund this brief's preparation or submission.

Foundation for the Visual Arts ("the Warhol Foundation") wants to change this accepted understanding of the Copyright Clause by replacing it with a utilitarian-based regime that would fail to uphold an author's rights to the extent that doing so would stifle creativity. While the fair use doctrine is an affirmative defense to copyright infringement, the Warhol Foundation is proposing an interpretation of it that is as unprecedented as it is radical. The Warhol Foundation asks this Court to hold that anytime an author reproduces someone else's original work in its entirety, but superimposes his own subjective interpretation upon it, the new work is transformative under the fair use doctrine. But neither the text of the Copyright Clause, nor the history of copyright law, nor this Court's precedent can support such a reading. This Court should reject such a radical interpretation of the fair use doctrine and affirm the Second Circuit's conclusion that Warhol's Prince Series infringed on Goldsmith's right to the fruits of her labor in creating her photograph of Prince.

ARGUMENT

I. The fair use doctrine must be interpreted in a manner that upholds the Copyright Clause's textual empowering of Congress to protect the fundamental civil right to the fruit of one's labor.

A. The Copyright Clause codifies the founding-era understanding of copyright law.

In arguing for an expansion of the fair use doctrine that would encompass as "transformative" any work its author subjectively believes to convey a meaning different from that of the original work, the Warhol Foundation fundamentally misconstrues the Copyright Clause as being a utilitarian, pragmatic instrument that does nothing other than advance the arts and sciences. On the contrary, the Clause's text as understood at the time of the Constitution's enactment empowers Congress to protect an individual's fundamental civil right to the fruits of his or her labor. *See Wheaton v. Peters*, 33 U.S. 591, 658 (1834) ("That every man is entitled to the fruits of his own labour must be admitted[.]"). Certainly, protecting such a fundamental civil right can serve the purpose of furthering the arts and sciences, but this Court has warned against interpreting the Clause's purpose in a manner that would minimize or eliminate the fundamental right it empowers Congress to protect. *See Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003). Consequently, this Court should reject any interpretation of the Clause that would undermine its

protection of this fundamental civil right—especially the Warhol Foundation's utilitarian interpretation.

1. In interpreting a legal text, a court should give its words their plain and ordinary meaning as they were understood at the time of the text's enactment. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (applying this textualist approach to the Second Amendment); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* §§ 2, 6–7 (2012). Here, "text, history, and precedent" confirm that the Copyright Clause empowers Congress to protect a fundamental civil right "inherited from our English ancestors." *See Eldred*, 537 U.S. at 199; *Heller*, 554 U.S. at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)). The Clause declares that Congress has the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const. art. I, § 8. It thus has two parts—an operative section empowering Congress to protect a substantive right, and a prefatory section explaining the purpose behind empowering Congress to protect that right. It could be rewritten to say: "Because it is important to promote the progress of science and useful arts, Congress shall have the power to secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries." *See, e.g., Heller*, 554 U.S. at 577 (applying similar rephrasing to the Second Amendment's prefatory and operative clauses).

The Clause's prefatory section, however, cannot limit the scope of its operative section empowering

Congress to protect the right to intellectual property. At most, the preface clarifies any ambiguity in the operative section. *See id.* at 577–78 ("Logic demands that there be a link between the stated purpose and command . . . . But apart from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause."); Scalia & Garner, *supra*, at § 2, 56–57 ("[P]urpose . . . cannot be used to contradict text or to supplement it."). The Clause plainly empowers Congress to protect a substantive *right* individuals have, as opposed to empowering Congress to create a pragmatic, utilitarian *privilege* for individuals.

2. As to the nature of the "right" referenced in the Copyright Clause, the Founders were unanimous in understanding it to be a fundamental civil right to the fruits of one's labor, deriving from a property right under natural law. John Locke, for example, wrote that "every man has a *property* in his own person," and that "[t]he *labour* of his body, and the *work* of his hands . . . are properly his." John Locke, *Two Treatises of Government*, § 27, 209 (New Edition 1821). Similarly, William Blackstone wrote in support of the right "which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies." William Blackstone, 2 *Commentaries on the Laws of England* *405. According to Blackstone, "[w]hen a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right." *Id.* at *405–06. This position is a far cry from the

utilitarian, pragmatic approach to copyright law that the Warhol Foundation advances.

James Madison similarly viewed the Copyright Clause as empowering Congress to protect an author's right to the fruits of his or her labor, even if the Clause has the stated purpose of furthering the arts and sciences. Madison's comments on this Clause in *The Federalist* are mainly focused on the practical advantages of the Clause for the public at large. *See The Federalist* No. 43, at 274 (Modern Library ed. 2001) ("The utility of this power will scarcely be questioned."). Yet he also took pains to emphasize that "[t]he public good fully coincides . . . with the claims of individuals." *Id.* In other words, Madison viewed no opposition between the Clause having the stated purpose of furthering the arts and sciences while at the same time empowering Congress to protect fundamental property rights of individuals. This Court has recognized such an interpretation of Madison's writings, rejecting the argument that copyright law must serve exclusively public, as opposed to private, goals. *See Eldred*, 537 U.S. at 212, n.18.

Madison's view accords with those of Joseph Story and James Kent—two of the most important jurists during the early years of our republic. In writing about why it was important to empower the federal government to enforce copyright law, Story left no doubt to his readers that he viewed it as protecting an author's property right. *See* Joseph Story, *A Familiar Exposition of the Constitution of the United States* 118 (1842) ("[I]f authors . . . are to have any real property or interest in their writings . . . it is manifest, that the

power of protection must be given to, and administered by, the General Government."). Kent, in writing about the Clause, declared that "[i]t is just that [authors] should enjoy the pecuniary profits resulting from mental as well as bodily labour." James Kent, 2 *Commentaries on American Law* 365 (6th ed. 1848).

Of course, the founding generation's understanding that individuals have a natural property right to the fruits of their labor did not mean that such rights were immune from certain modifications or adjustments on the part of the government. *See* Randolph J. May & Seth L. Cooper, *The Constitutional Foundations of Intellectual Property* 27 (2015). Such modifications "ensure[d] that the core of those natural rights [might] be exercised, consistent with the equal exercise of rights by others in civil society." *Id*. Under Locke's view, individuals gave up the individual ability to enforce their natural rights upon entering society. *See* Locke, *supra*, at § 128, 297–98. But Locke also recognized that "in creating civil society, individuals not only secured the protection of their natural rights but gained a litany of other rights that defined their freedoms relative to their new fellow citizens and public institutions." Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents?*, 92 Cornell L. Rev. 953, 971 (2007). These were rights not existing in a state of nature but rather existing within, and as part of, civil society. *See id*. at 971–72. Frequently, these new rights were referred to as "privileges," but this did not change the fact that they were designed to protect natural rights amounting to "fundamental civil rights." *See id.* at 970–71. For example, Madison himself recognized the right to a jury trial as a

"fundamental civil right." *Id.* at 973–74. Of its very nature, such a fundamental right could only exist within civil society, but this did not change the fact that it was rooted in securing the natural right to life and liberty. *See id.* at 974. The same could be said about the understanding of copyright law during this time.

This Court's very first case to deal with copyright law confirmed the Founders' view of the Copyright Clause. While rejecting the notion that the Copyright Clause secured to authors a pre-existing, perpetual right to the fruits of their work, this Court nevertheless recognized that the Clause empowered Congress to protect the fundamental civil right that authors enjoy to the fruits of their works under certain conditions and time limits. *See Wheaton*, 33 U.S. at 657–58, 663–64. It held "[t]hat every man is entitled to the fruits of his own labour . . . but he can only enjoy them, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general." *Id.* at 658. This is a textbook definition of a fundamental right existing within civil society. While distinct from the natural rights inhering in the state of nature, the Copyright Clause is nevertheless based on such rights. *See* Mossoff, *supra*, at 988–89 ("[C]ertain types of property can be protected only in civil society, and we identify these important civil rights by reference to the same policy that justifies natural rights in property—securing to each person the fruits of his labors.").

Had the *Wheaton* Court viewed the Copyright Clause as grounded in utilitarian concerns, it would never have termed legislation passed under that Clause as serving to protect an author's "right" to the fruits of his or her labor. And despite occasionally referring to copyright protections as "monopoly privileges," *see, e.g., Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 428 (1984), at the end of the day this Court has always understood the Copyright Clause as empowering Congress to protect a fundamental civil right to the fruit of one's labor, even if the nature and extent of that right may depend on a particular statutory definition. This understanding prompted the Court's warning against understating the relationship between the Clause's purpose of furthering the arts and sciences and its empowering of Congress to ensure that authors receive appropriate remuneration for their "creative labors." *See Eldred*, 537 U.S. at 212 n.18.

This rights-based view of copyright law, based on the Copyright Clause's text as understood at the time of its enactment, is a far cry from the pragmatic, utilitarian view that the Warhol Foundation advances. The Warhol Foundation describes the Clause as a mere instrument to award creativity as a means of benefiting the public and promoting free expression. *See* Pet'r's Br. 4. In fact, the Clause empowers Congress to protect what was unanimously understood at the time of the Clause's enactment as being a fundamental civil right.

B. The fair use doctrine has always been interpreted to uphold the fundamental civil right to the fruits of one's labors.

It is only with the above background about how the Copyright Clause empowers Congress to protect a fundamental civil right that the fair use doctrine can be properly understood. As Justice Joseph Story emphasized over 200 years ago, the fair use doctrine is a matter "in which it is not . . . easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases." *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (Story, J.). He went so far as to label it part of "what may be called the metaphysics of the law, where the distinctions are . . . very subtle and refined, and, sometimes, almost evanescent." *Id*. But despite this case-by-case, context-specific nature of the doctrine, two principles emerge upon an examination of the historical caselaw: (1) the doctrine is at its narrowest where a "substantial portion" of the original is copied onto the new work; and (2) an author's subjective interpretation regarding the nature and meaning of the second work is never dispositive to the extent such an interpretation conflicts with an objectively reasonable observation. In any event, the second work must be interpreted in a manner that gives full vindication to the fundamental civil right of the original author to the fruit of his or her labor.

1. In *Lewis v. Fullarton*, the plaintiffs published a topographical dictionary and subsequently sued the defendant for publishing a dictionary that contained material similar to theirs. *See* (1839) 48 Eng. Rep.

1080.[2] The court found it undisputed that "a considerable portion of the matter which is contained in the Plaintiffs' work has found its way into the work of the Defendant[.]" *Id*. But while the defendant and his agents had a right to go to the same original sources as the plaintiffs to compose their own work, they did not have the right "to save themselves the trouble and expense by availing themselves, for their own profit, of other men's works still subject to copyright and entitled to protection[.]" *Id*. at 1081. Were it to be held otherwise, "it is plain no protection whatever could be given to any work . . . the subject-matter of which is open to common observation and enquiry[.]" *Id*. This would destroy the very nature of copyright as protecting a fundamental civil right, as it would mean "that every man who had bestowed any amount of labour or expense in collecting and arranging the information requisite for the production of such a work, might immediately on its publication, be deprived of the fruit of his industry and ability." *Id*. The court issued an injunction prohibiting the further publication of those portions of the defendant's dictionary that they had lifted from the plaintiffs' work. *See id*. at 1083. In doing so, it also noted that if the defendant could not separate out the parts of the work borrowed from the original work without destroying the

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[2] Even following the Constitution's enactment, American jurists continued to cite recent developments in English law in support of their conclusions on the fair use doctrine. *E.g., Folsom*, 9 F. Cas. at 345, 348 (Story, J.). Accordingly, English cases following the Constitution's enactment still amount to persuasive authority on the fair use doctrine.

new work, the defendant had nobody to blame but himself. *See id*. at 1082.

One of the very first American cases to deal with the fair use doctrine—*Folsom*—likewise involved a practical verbatim reproduction of the most important parts of the original work. In that case, the plaintiff published a collection of George Washington's letters. *See Folsom*, 9 F. Cas. at 345. The defendant published his own "autobiography" of Washington that consisted of quotations from the most important parts of Washington's letters set forth in the original work. *Id*. It was undisputed that the defendant's work was "formed upon a plan different from that of [the plaintiff] . . . ." *Id*. Nevertheless, Justice Story found this to be a copyright infringement that fair use could not overcome. "If so much is taken," he wrote, "that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy . . . ." *Id*. It was within this context that Story gave his famous definition of "fair use" that has formed the basis of the doctrine ever since. *See id*. ("[W]e must . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.").

In concluding that the new work did not constitute a fair use of the original work, Justice Story was well aware of the possibility that this might stifle creativity. *See id*. at 349 ("I have come to this conclusion, not

without some regret, that it may interfere, in some measure, with the very meritorious labors of the defendants, in their great undertaking of a series of works adapted to school libraries."). But any such risk could not outweigh the fact that the second work interfered with the fundamental civil right of the original author to the fruits of his labor, and accordingly the Justice enjoined publication of the second work. *See id*.

Numerous English and American courts applied the principles of *Lewis* and *Folsom* throughout the rest of the nineteenth century. In the vast majority of cases where the second author reproduced the most important portions of the original work, the reproduction was held not to amount to fair use. *See, e.g., Emerson v. Davies*, 8 F. Cas. 615 (C.C.D. Mass. 1865) (Story, J.) (finding infringement where defendant reproduced plaintiff's book of arithmetic lessons with similar lesson plans and page layouts); *Bohn v. Bogue*, (1846) 10 Jurist 420 (enjoining publication of a book about Lorenzo de Medici that quoted heavily from the plaintiff's earlier biography about Medici); *Sweet v. Benning*, (1855) 139 Eng. Rep. 838 (finding infringement where the defendant's law digest copied headnotes from the plaintiff's law reports); *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (finding infringement where the defendant performed a play that reproduced a famous railroad scene in the plaintiff's original play with different text); *Lawrence v. Dana*, 15 F. Cas. 26 (C.C.D. Mass. 1869) (Clifford, J.) (finding infringement where the defendant reproduced the plaintiff's international law treatise with his own additional notes).

A common theme running throughout all of these cases is the conclusion that by reproducing a substantial portion of the plaintiff's original work, the defendant interfered with the plaintiff's fundamental civil right to the fruit of the original work. *See, e.g., Falk v. Donaldson*, 57 F. 32, 36–37 (C.C.S.D.N.Y. 1893) (ruling that an author "is entitled to any lawful use of his property, whereby he may get a profit out of it"). Whenever there is a conflict between infringing on the fundamental civil right of the original author and the risk of stifling creativity, courts have generally elected to uphold the original author's rights. *See, e.g., Folsom*, 9 F. Cas. at 349. Warhol's utilization of Goldsmith's Prince photograph to make his own artwork is no different from these earlier cases. Warhol literally reproduced the entire portion of Goldsmith's original work. Prince's face, as the subject of the photograph, was the "raw material" available to both Goldsmith and Warhol as artists. They both had an equal right to attempt and take this raw material and turn it into their own work through photography. But Warhol did not have the right to skip a step by using Goldsmith's photograph as the basis for his own work. It is difficult to find a more blatant example of copying a "substantial portion" of an earlier work than here. It cannot amount to fair use.

2. In addition to the above, an author's subjective interpretation of the second work has never been dispositive in assessing fair use's applicability. In one early case, the English Court of Chancery ruled that "[t]he intention to pirate is not necessary . . . it is enough that the publication complained of is in substance a copy, whereby a work vested in another is

prejudiced." *Roworth v. Wilkes*, (1807) 170 Eng. Rep. 889, 890. Over a century later, the Southern District of New York—the originating court for this case—held that "[t]he meaning or interpretation which the author gives to her or his literary effort cannot be accepted as the deciding test; the [work] must be judged as it is; nothing can be read into it which is not there." *Wiren v. Shubert Theatre Corp.*, 5 F. Supp. 358, 362 (S.D.N.Y. 1933), *aff'd* 70 F.2d 1023 (2d Cir. 1934). In other words, courts must avoid getting bogged down in debates over the author's subjective interpretation of the secondary work, because "the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naïve, ground of its considered impressions upon its own perusal." *Id.* (quoting *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930)).

This emphasis on the need to view the second work "as it is," without giving dispositive deference to the author's subjective interpretation of the matter, is a far cry from what the Warhol Foundation is proposing here. Under the Warhol Foundation's argument, a work is always transformative under the fair use doctrine if its author subjectively interprets it as conveying a new and different meaning from that of the original work. This interpretation has no basis in the fair use doctrine as courts have traditionally applied it, and this Court should decline to adopt it.

II. Holding Warhol's work at issue here to be "transformative" would expand the fair use doctrine beyond anything previously known and effectively negate copyright's ability to protect the fundamental civil right to the fruits of one's labors.

The Warhol Foundation's argument is quite striking—it boils down to the claim that so long as the author of the second work subjectively interprets it to have a different meaning than that of the first work, then it is of its very nature "transformative" within *Campbell*'s meaning and amounts to a fair use of the original work. According to the Warhol Foundation, this is the only way to prevent a stifling of creativity. But as demonstrated above, the Copyright Clause empowers Congress to protect the fundamental civil right to the fruits of one's labors through the enactment of copyright laws, regardless of any utilitarian concerns about stifling creativity. Any interpretation of the Clause that would interfere with this right must be rejected.

This case is highly similar to ones where authors have substantially quoted earlier works while at the same time adding small material of their own. The Warhol Foundation maintains that Warhol's subjective interpretation of his revised version of Goldsmith's photograph of Prince conveys a new and different meaning from that of the original photograph. This is insufficient for a work to amount to fair use because one must look at the work "as is," not as the later artist perceives it. Looking at the work "as is," the Warhol Prince Series is clearly just as much an artistic

photograph as the original Goldsmith photograph. The Warhol Foundation does not claim that the Prince Series is a parody of the original Goldsmith photograph, making this case readily distinguishable from *Campbell* where this Court held that parody, of its very nature, requires reproduction of the original work in some form. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994). No such parody is at work here.

Even more importantly, the Warhol Foundation has proffered no reason why it was necessary for Warhol to utilize Goldsmith's photograph to make his own work. There is no reason why Warhol could not have taken his own photograph of Prince and then imposed his unique artistic style upon that image. As noted earlier, Prince, as an individual, was the common material available to both Goldsmith and Warhol as artists. Indeed, the evidence demonstrates that Warhol was perfectly capable of photographing Prince himself. *See* Resp't's Br. 38. Warhol did not have the right to "to save [himself] the trouble and expense by availing [himself], for [his] own profit, of [Goldsmith's photograph] still subject to copyright and entitled to protection . . . ." *See Lewis v. Fullarton*, (1839) 48 Eng. Rep. at 1081.

The adverse consequences that would follow from adopting Warhol's arguments are easy to see. Such an interpretation of fair use would, for all practical purposes, substantially diminish copyright protections as they have been understood for nearly three centuries. It would enable any artist to take another artist's pre-existing work in its entirety, make a de minimis amount of modifications, then present it as a

new work based solely on the second artist's subjective interpretation of the work as conveying something different from the original. This Court cannot allow such an interpretation of fair use to take hold.

Goldsmith is correct to argue that copying a substantial portion of an original work is "transformative" under the fair use doctrine only if such copying was indispensable to accomplishing the new work's purpose. *See* Resp't's Br. 26. Parody and criticism, for example, inevitably must copy certain parts of the original work to accomplish their purpose. But the Warhol Foundation has proffered no explanation whatsoever as to why it was necessary for Warhol to utilize Goldsmith's photograph instead of approaching Prince to take his own photo of the late artist. Nor has it proffered any explanation about why it would have been difficult for it to obtain authorization from Goldsmith to print the Prince Series following his death in 2016. It was Warhol's decision to utilize the work of another artist in creating the series, and in the absence of him giving any reason why Goldsmith's particular work was essential to accomplishing his purpose, the Warhol Foundation cannot now complain about any adverse consequences that may flow from such a decision. *See Lawrence v. Dana*, 15 F. Cas. 26, 62 (C.C.D. Mass. 1869) (holding that an author "has only himself to blame" if he has so intermixed his own work with an original work that it is impossible to enjoin publication of the original work without also enjoining publication of the new work).

At the end of the day, Goldsmith has a fundamental civil right to the fruits of her labor in producing her

photograph of Prince. The Warhol Foundation is seeking to negate that right by convincing this Court that Warhol was allowed to skip a step in his own labor as an artist and appropriate her work as the basis for his own, despite Warhol's project not requiring that he do so. This does not amount to fair use—it amounts to old-fashioned piracy, plain and simple. This Court should reject such a radical interpretation of the fair use doctrine.

CONCLUSION

This Court should affirm the Second Circuit.

Respectfully submitted,

CURT LEVEY
THE COMMITTEE FOR JUSTICE
3033 Wilson Blvd.
Suite 729
Arlington, VA 22201
(202) 270-7748

JOHN M. REEVES
Counsel of Record
REEVES LAW LLC
7733 Forsyth Blvd.
Suite 1100--#1192
St. Louis, MO 63105
(314) 775-6985
reeves@appealsfirm.com

Counsel for Amicus Curiae